Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Mayor, Councillors and Citizens of the City of Hawthorn v. *Kannuluik, from the Supreme Court of Victoria; delivered the 7th November* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD JAMES OF HEREFORD.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

The conduit in the City of Hawthorn, which is now known as the "main drain" and for the most part is an open sewer, was formerly a natural watercourse receiving and carrying off nothing but the surplus storm-water of a hilly district about five hundred acres in extent. This district or drainage area, as it may be termed, has been divided between the municipalities of Hawthorn, Kew, and Boroondara. Hawthorn has about half. The rest is comprised within the limits of the other two municipalities in nearly equal proportions. Kew on the north and Boroondara on the north-east and east are at rather a higher level and naturally drain through Hawthorn.

In 1888 the Plaintiff Jaan Kannuluik purchased a plot of ground abutting on the watercourse at its lowest point in Hawthorn just where it turns to the south with a sharp bend after passing under Auburn Road. From a contour

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plan of the drainage area it appears that the fall to this point is not less than 140 feet.

In 1889 the municipal authorities of Hawthorn under their statutory powers took over the care and management of this watercourse and made it into a public drain. They spent a good deal of money upon it in the way of improvement at intervals down to the year 1896. The work was done in sections. The section adjoining Kannuluik's property was pitched and finished in 1889. A number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission, for the purpose of running off the storm-water and sewage into the main drain. The result is that the water and sewage from the upper parts of Hawthorn and from the parts of Kew and Boroondara which drain through Hawthorn are concentrated and poured into the main drain with great violence. When there is heavy rain the rush of water is so great and so sudden that the channel becomes choked. There is an overflow, and when the flood subsides, the low-lying lands, and Mr. Kannuluik's premises in particular, the ground-floor of his dwelling-house and the surface of his garden, are covered with an offensive mixture of sewage and slime.

After several ineffectual complaints Mr. Kannuluik brought this action against the municipality of Hawthorn. The case was tried by Williams, J., without a jury. It occupied no less than seven days. The learned Judge found in favour of the Plaintiff and assessed the damages at 250*l*.

On Appeal the Full Court affirmed the judgment of Williams, J., but not altogether upon the same grounds. The learned Judge who tried the case relied principally, though not entirely, on faulty construction in 1889. In the Full Court, where the leading judgment was

given by Holroyd, J., the decision turned rather on the subsequent acts and conduct of the municipal authorities.

Their Lordships agree with Holroyd, J. The case seems to be a very simple one. The only question is, have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik ?

As for negligence it is difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the Plaintiff's land. The damage to the Plaintiff cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the Plaintiff's hands and in the hands of his predecessors in title, was often flooded before the municipal authorities turned the water course into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief. Indeed, if the evidence of the surveyors called on behalf of the Plaintiff may be trusted, the matter can be set right at a very trifling cost.

Their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed.

The Appellants will pay the costs of the Appeal.